Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

KATHERINE ANN POWER,
PETITIONER,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF MASSACHUSETTS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a state court may impose admittedly content-based restrictions on the speech of a probationer upon no more than a general finding that such a restraint "reinforces the moral foundations of our society"?

Whether a content-based restraint on speech must be strictly scrutinized by the courts? Alternatively, whether the court below erred by not reviewing a content-based restriction under even the intermediate level of scrutiny for content-neutral court orders specified in *Madsen* v. *Women's Health Center, Inc.*, 114 S.Ct. 2516 (1994)?

Whether a probation condition which forbids a probationer from "directly or indirectly engaging in any profit or benefit generating activity relating to the publication of facts or circumstances pertaining to [her] involvement in the criminal acts for which [she was] convicted" is so vague as to impose a prior restraint?

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KATHERINE ANN POWER,
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v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

Katherine Ann Power respectfully petitions for a writ of certiorari to review the judgment of the Supreme Judicial Court of Massachusetts in this case.

OPINIONS BELOW

The opinion of the Supreme Judicial Court of Massachusetts (App., *infra*, 1a-12a) is reported at 420 Mass. 410, 650 N.E.2d 87. The oral sentencing order of the Superior Court and its order denying Power's motion for reconsideration (App., *infra*, 16a) are unreported.

JURISDICTION

The Supreme Judicial Court of Massachusetts entered its judgment on May 18, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

STATEMENT OF THE CASE

On September 15, 1993, Katherine Ann Power ended 23 years of life as a fugitive by surrendering to authorities. Pursuant to a plea agreement, Power pleaded guilty in state court to one count of manslaughter and two counts of armed robbery.[1]

On October 6, 1993, the court sentenced Power to concurrent 8-12 year prison terms on the manslaughter and armed robbery charges, which was consistent with the District Attorney's recommendation. The court then announced that it would "step aside" from the government's recommendation "in one major area." The court imposed twenty years' probation, to run concurrently with the prison sentences, and added a special condition of probation:

> I enjoin you and I prohibit you from any activity, of any nature, which can generate profit to you for the crimes you committed, and violation of any condition of that probation will subject you to surrender and up to life in prison.

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[1] Power's plea was the result of her participation in a bank robbery. In September, 1970, Power, then a college student, was engaged in activities protesting the Vietnam War. That campaign took a tragic turn when she and several others decided to rob a bank. After the robbery was complete and all of the participants except William Gilday had fled, Boston Police Officer Walter Schroeder arrived on the scene in response to an alarm. Gilday fatally shot Officer Schroeder. During both the robbery and shooting, Power was in a "switch" car about one half mile from the scene.

The court gave Power an opportunity to withdraw her plea. Power, whose consistent position has been that she seeks no personal financial gain, did not withdraw her plea.

After the hearing, Power was returned to a holding cell, where, for the first time, she was given typewritten Special Conditions. (App., *infra*, 15a). The document stated:

> You, your assignees and your representatives acting on your authority are prohibited from directly or indirectly engaging in any profit or benefit generating activity relating to the publication of facts or circumstances pertaining to your involvement in the criminal acts for which you stand convicted (including . . . the expression of your thoughts, feelings, opinions or emotions regarding such crime). This prohibition includes those events undertaken and experienced by you while avoiding apprehension. . . .

Power read and signed the document.

Later that day (October 6) and again on October 7, 1993, Power's counsel wrote to the court seeking clarification of the written conditions, without success. Subsequently, Power's probation officer orally asserted that Power could speak to no one except her lawyers and therapists about the events of her life from September, 1970 to September, 1993 without violating the Special Conditions.

On October 29, 1993, the court denied Power's formal motion for reconsideration, which had asserted that the Special Conditions, as drafted, violated the First Amendment to the United States Constitution.

On appeal, the Supreme Judicial Court of Massachusetts agreed that the Special Conditions impose a content-based restriction on Power's speech. (App., *infra*, 6a).[2] Nevertheless, the court upheld the order, holding that the Conditions need

[2] The Court rejected the Commonwealth's argument that Power had not properly preserved her constitutional objections. (App., *infra*, 1a n.1).

not survive strict scrutiny, and were valid because the restraint on speech was "reasonably related to a valid probation purpose." (App., *infra*, 8a).

REASONS FOR GRANTING THE WRIT

The Supreme Judicial Court of Massachusetts has effectively held that state courts have the discretionary authority to impose content-based restrictions on any speech, so long as the speaker has been convicted of a crime. The "special conditions of probation" — which took effect immediately, even though Power is in prison and not in any meaningful sense on probation — single out speech related to Power's crime and her life as a fugitive for a financial burden imposed on no other speech. According to the opinion below, such a restriction need only pass a single, relatively trivial hurdle: that it be "reasonably related" to "a legitimate purpose of criminal sentencing." (App., *infra*, 9a). As this case demonstrates, such restrictions are in fact self-justifying: prohibiting probationers from speaking for compensation, the Massachusetts court concluded, is always permissible, because it reinforces "the moral foundations of our society." *Id.*[3]

The writ of certiorari should be granted for three reasons. First, the decision contributes to a growing dispute among the lower courts about the extent to which those convicted of crime may be subjected to otherwise unconstitutional restrictions on fundamental rights. Second, the decision addresses a critical issue concerning the appropriate standard of review, holding that content-based restrictions on speech need only be "reasonable" if imposed by a court, though concededly subject to "strict scrutiny" if imposed by a legislature in a statute of general applicability. Third, the Special Conditions impose an unjustifiable prior restraint: the order, in effect, requires

[3] This is therefore not even a case like *Simon & Schuster, Inc.* v. *New York Crime Victims Board*, 502 U.S. 105 (1991), where the state asserted an interest in compensating victims of crime. The court here simply upheld a prohibition on compensation for speech.

Power to have her speech pre-approved by her probation officer, whose exercise of unfettered discretion receives no assistance from the vague terms of the Special Conditions, and who has the authority to threaten Power with revocation of her probation, and possibly life imprisonment, for any perceived violation.

1. *The Ruling Conflicts With Other Lower Court Precedent.*

Although it is well-established that probationers may be subject to restrictions that would be impermissible if applied to the general public,[4] the lower courts are divided over the application of that general rule to restrictions of fundamental constitutional rights.

The majority of federal and state courts hold that probation conditions infringing on constitutionally protected rights are subject to "special scrutiny,"[5] and must be "fine-tuned" to probationary goals closely related to the crime. *United States* v. *Smith*, 972 F.2d 960, 961-62 (8th Cir. 1992). A defendant convicted of assault during a political demonstration, for example, may be forbidden from active participation in demonstrations during his probation, but not from all speech about political causes.[6] Other courts, including the Second,[7] Fifth,[8] and Sixth[9] Circuits, have upheld conditions restricting First Amendment activities where the conviction was for a crime committed during the course of expressive activity,

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[4] *See, e.g., Griffin* v. *Wisconsin*, 483 U.S. 868, 873-74 (1987), *United States* v. *Consuelo-Gonzalez*, 521 F.2d 259, 265 (9th Cir. 1975) (en banc).

[5] *Consuelo-Gonzalez*, 521 F.2d at 265; *see also Sobell* v. *Reed*, 327 F.Supp. 1294, 1303 (S.D.N.Y. 1971) (holding that such conditions must be "tested by 'stringent standards' and subjected to 'rigid scrutiny'" (quoting *Jackson* v. *Godwin*, 400 F.2d 529, 541 (5th Cir. 1968))).

[6] *In re Mannino*, 14 Cal. App. 3d 953, 92 Cal. Rptr. 880 (Cal. Ct. App. 1971); *see also United States* v. *Lowe*, 654 F.2d 562 (9th Cir. 1981); *Markley* v. *State*, 507 So.2d 1043 (Ala. Cr. App. 1987).

[7] *United States* v. *Tolla*, 781 F.2d 29, 33-34 (2d Cir. 1986).

[8] *United States* v. *Tonry*, 605 F.2d 144 (5th Cir. 1979).

[9] *United States* v. *Peete*, 919 F.2d 1168, 1181 (6th Cir. 1990).

though without expressly holding that the First Amendment required such a rule.

Massachusetts now joins a minority of courts applying a weaker standard, requiring only that the probation condition be reasonably related to general aims of the criminal justice system.[10] In decisions predating this Court's holding in *Simon & Schuster, Inc.* v. *New York Crime Victims Board*, 502 U.S. 105 (1991), two other courts have, like Massachusetts, effectively held that a no-profit restriction may be imposed on any convict, regardless of the crime. *See United States* v. *Terrigno*, 838 F.2d 371 (9th Cir. 1988); *United States* v. *Waxman*, 638 F. Supp. 1245 (E.D. Pa. 1986). In *Waxman*, the court upheld a ban on financial benefit from "any TV or radio scenario" about the crime, without subjecting the restriction to strict scrutiny and without making any reference to the limitations described above.

This Court should resolve the growing conflict among the lower courts as to the legitimacy of such speech restrictions and the appropriate standard for reviewing them. Courts have considered these issues for years without reaching consensus, and public interest in limiting the speech of those involved in the judicial process has grown markedly in recent months.

2. *The Case Raises Important and Broadly Applicable Issues That Are Likely To Recur.*

The ruling below decides important issues left open by this Court's decision in *Simon & Schuster, Inc.* v. *New York Crime Victims Board*, 502 U.S. 105 (1991). There, the Court struck down a statute of general applicability (the so-called "Son of Sam" law) that required those accused or convicted of crime to turn over to the state any money received for speech con-

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[10] *See, e.g., United States* v. *Williams*, 787 F.2d 1182 (7th Cir. 1986) (drug screening condition unrelated to defendant's crime); *Edwards* v. *State*, 173 Ga. App. 589, 327 S.E.2d 559 (1985) (condition banishing probationer from judicial circuit); *State* v. *Miller*, 175 Wisc. 2d 204, 499 N.W.2d 215 (1993) (condition related only to prior crimes).

cerning the crime. The Court subjected the content-based restriction to strict scrutiny. 502 U.S. at 115-16. Although acknowledging the state's compelling interests in preventing criminals from profiting from crime and in using criminal proceeds to compensate victims,[11] the Court nevertheless held that the statute was constitutionally infirm because it was overbroad: it applied to any publication in which the author mentioned, however tangentially, involvement in criminal activity. See 502 U.S. at 118-23.

The Special Conditions at issue here do not suffer from the same sort of overbreadth, because they are directed solely at one individual, who pleaded guilty to the charges against her. Yet the Massachusetts court's holding is equally broad, as it authorizes a particular content-based restriction on the speech of anyone convicted of a crime. Indeed, the potential penalty imposed on Power is far greater: not merely the loss of book royalties, at issue in *Simon & Schuster*, but a potential sentence of life in prison. This case therefore raises significant issues that go beyond the questions presented to the Court in *Simon & Schuster*.

a. *The Ruling Permits Content Based Restrictions Without Strict Review.*

First, and perhaps most fundamentally, the Supreme Judicial Court held that where content-based financial burdens on speech are imposed by courts rather than by legislatures, those orders are not subject to the usual "strict scrutiny," but merely to some casual examination akin to the "rational basis" review applied to classifications that do not burden fundamental rights. The decision thus not only flouts the established rule that content-based restrictions on speech always

[11] The Court expressly declined to address whether payments for speech about a crime could be considered "proceeds of crime" for these purposes. *Id.* at 119.

trigger the strictest scrutiny,[12] but also ignores even the lesser requirement of *Madsen* v. *Women's Health Center, Inc.*, ____ U.S. ____, 114 S. Ct. 2516 (1994). There, the Court held that precisely because judicial orders direct their commands to particular individuals, injunctions restraining speech "carry greater risks of censorship and discriminatory application," and must be measured by more rigorous tests than their legislative counterparts. 114 S. Ct. at 2524.[13]

Three Justices, in fact, would have applied strict scrutiny to the restriction at issue in *Madsen*, even though the restraint on speech was content-neutral, and was directly related to the past illegal conduct that formed the basis for the injunction. *Id.* at 2537-40 (Scalia, J., concurring in the judgment in part and dissenting in part).

In this case, by contrast, the probation order is simply a nonremedial prior restraint on speech, and one that, as the Massachusetts court admitted, singles out speech of a particular content. Such restraints are always subjected to the most exacting scrutiny. *See, e.g., Nebraska Press Assn.* v. *Stuart*, 427 U.S. 539 (1976); *Near* v. *Minnesota ex rel. Olsen*, 283 U.S. 697 (1931). The lower court's lenient review of the Special Conditions ignores both the uniform rule governing prior restraints and the Court's more recent elucidation of an intermediate standard of review in *Madsen*.

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[12] *See, e.g., Turner Broadcasting System, Inc.* v. *FCC*, ____ U.S. ____, 114 S. Ct. 2445 (1994); *Simon & Schuster*, 502 U.S. at 115-118; *Leathers* v. *Medlock*, 499 U.S. 439, 447 (1991); *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221, 230 (1987); *Regan* v. *Time, Inc.*, 469 U.S. 641, 648-649 (1984). *See generally* L. Tribe, American Constitutional Law § 12-2 (2d ed. 1988).

[13] The ruling even accords probationers' speech, regardless of its content, less protection than avowedly commercial speech. *See, e.g., Edenfield* v. *Fane*, ____ U.S. ____, 113 S. Ct. 1792 (1993) (requiring actual evidence that government regulation of commercial speech directly advances a substantial government interest and is no more extensive than necessary).

b. *The Ruling Too Broadly Exempts Those Convicted Of Crime From The Protections Of The First Amendment.*

The New York statute reviewed in *Simon & Schuster* was overbroad because it confiscated the proceeds of any work that included even an incidental admission of a crime, by an author who had been neither charged nor convicted. The ruling at issue here does not suffer from that same overbreadth, but poses, in effect, the next constitutional issue: in what circumstances a court may prohibit compensated speech by an order targeted at a specific individual convicted of a crime. The Massachusetts court's answer to that question has a reach perhaps even broader than the Son of Sam law. The court held that any convicted defendant may be placed on probation — concurrently with any other sentence imposed — and subjected to a restraint that need only "reinforce the moral foundations of our society" to pass constitutional muster.[14] That is no restriction at all: what content-based restriction on a convict's speech could not be said to meet such a "standard"?

Were the restriction at issue imposed on anyone other than a criminal defendant, it would quickly be struck down as patently unconstitutional. But courts have never considered the identity of the speaker a material consideration in determining whether speech is constitutionally protected, or whether it may be regulated on the basis of its content. *See, e.g., First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 777 (1978) ("The inherent worth of the speech in terms of

[14] The other interests which the court below cited are no more limiting: "[t]his defendant, and other defendants similarly situated, are deterred from seeking to profit directly or indirectly from criminality, . . . the defendant (and others like her) are given to understand that the crime committed and her . . . fugitive status . . . will bring neither reward, benefit, nor profit and her rehabilitation and understanding of the depth of her criminality are enhanced." (App., *infra*, 9a).

its capacity for informing the public does not depend upon the identity of its source.").[15]

The ruling below, both by imposing a financial burden on speech and by requiring pre-approval by a probation officer, effectively authorizes courts to restrain the speech of anyone convicted of a crime, and thereby deprives the public of the "thoughts, feelings, opinions [and] emotions" of a significant segment of the population. (App., *infra*, 15a). It does so because of some perceived need to announce to the world at large that "crime does not pay"[16] and to protect society's "moral foundations." In the end, the court below endorsed the same rationale that has always motivated government censors: a hope that they may shape public opinion by targeting and burdening disfavored speakers. That is flatly contrary to constitutional values, and that is why content-based restrictions always trigger strict scrutiny. To hold, as the Massachusetts court did, that probationers' speech may be restricted on the basis of its content because of a judicial judg-

[15] And although the Court has distinguished between prisoners and the general public for some purposes, *see, e.g., Turner* v. *Safley*, 482 U.S. 78 (1987), those decisions have been limited to the narrow area of "prison administration." *Id.* at 85. Those decisions have no bearing on a restriction imposed not to maintain good order in the prison but to serve a perceived need to reinforce "the moral foundations of our society." This Court has also held that depriving convicted felons of the right to vote does not violate the Equal Protection clause, *see Richardson* v. *Ramirez*, 418 U.S. 24 (1974), but that decision turned on the specific language of the Fourteenth Amendment, and involved a statute generally applicable to all felons — not, as here, a restriction on fundamental rights to which a defendant was asked to agree in exchange for a reduced sentence.

[16] The notion that the speech restriction serves that end, and somehow deters crime, is bizarre. Assuming that book royalties could be considered fruits of a crime, an issue this Court has not decided, it defies logic to suggest that individuals commit crimes with a plan to be caught, to write books from prison which they hope will become bestsellers, and then to hope they are released from prison soon enough to enjoy the profits and the victims of their crimes do not commence civil suits to attach the proceeds. *See, e.g,* Note, *Does Crime Pay — Can Probation Stop Katherine Ann Power From Selling Her Story?*, 35 B.C.L. Rev. 1203, 1232-33 (1994). The point, of course, is that it is the public which is potentially injured when speech is deterred.

ment that society is better off without that speech, is to deny those speakers the very core protection of the First Amendment.

3. *The Ruling Was Erroneous.*

Finally, petitioner seeks a writ of certiorari because the decision below is utterly irreconcilable with the basic requirements of the First Amendment. It saddles Power with a vague demand that neither she nor her "representatives" engage in any speech that the probation officer or the court might consider a "benefit generating activity." The singularly opaque prohibition[17] gives Power two choices: either submit to a prior restraint of the classic sort, by seeking advance permission from her probation officer for every public statement, or accept the possibility that her speech might later be held to violate the Special Conditions, subjecting her to a new prison sentence that may last the rest of her life.

The Constitution does not permit government to pose such a Hobson's choice to its citizens. An order which effectively "requires the submission of speech to an official who may grant or deny permission to utter or publish it based on its contents" is a prior restraint in its "simple, most blatant form." *Alexander* v. *United States*, ____ U.S. ____, 113 S. Ct. 2766, 2779 (1993) (Kennedy, J., dissenting).

Because the Special Conditions distinguish on the basis of content and are directed to speech indisputably protected by the First Amendment, they are invalid regardless of whether or not Massachusetts can present a "compelling interest." As Justice Kennedy explained in his *Simon & Schuster* concurrence, balancing free speech rights against the state's interest in content-based suppression of speech is "unnecessary and

[17] The vagueness of the restriction is hardly hypothetical. In her brief to the Supreme Judicial Court, Power asked rhetorically whether a book of poetry or a cookbook that mentioned her past in the book-flap biography would violate the condition. Astonishingly, the Commonwealth responded below that it certainly would, because any public interest in any work authored by Power could only be the product of her celebrity.

incorrect," because "resort to [that] test might be read as a concession that States may censor speech whenever they believe there is a compelling justification for doing so. Our precedents and traditions allow no such inference." *Simon & Schuster*, 502 U.S. at 124-25 (Kennedy, J., concurring). *See also Regan* v. *Time, Inc.*, 468 U.S. 641, 648-49 (1984) ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.").

Even if a compelling interest would save the Special Conditions, and the Commonwealth could demonstrate such an interest in preventing Power from profiting from speech about her crime, *see Simon & Schuster*, 502 U.S. at 119, the order is poorly tailored to that end and therefore invalid. As the Commonwealth argued before the Supreme Judicial Court, the order facially can be read to prohibit payment for poetry about Oregon, where Power lived as a fugitive, or for cookbooks that Power might write based on her experience as a chef during those years. The Commonwealth's concession demonstrates that the order is not truly directed to Power's rehabilitation, nor even to demonstrating that crime does not pay; it is the use of censorship as a purely punitive measure. The First Amendment does not permit government to use prohibitions on speech as a club to punish offenders, and the Supreme Judicial Court's authorization of such orders threatens to eliminate constitutional protection for any speech by those convicted of crime.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari to the Supreme Judicial Court of Massachusetts should be granted.

Respectfully submitted,

KATHERINE ANN POWER
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COMMONWEALTH *vs.* KATHERINE A. POWER

Suffolk. December 6, 1994. - May 18, 1995.

Present: LIACOS, C.J., WILKINS, ABRAMS, NOLAN, & LYNCH, JJ.

INDICTMENTS found and returned in the Superior Court on October 1, 1970.

The cases were heard by *Robert W. Banks*, J.

The Supreme Judicial Court granted an application for direct appellate review.

Joseph L. Kociubes (Mark W. Batten, Peter J. Mancusi & Sarah R. Wunsch with him) for the defendant.

John P. Zanini, Assistant District Attorney *(Katherine E. McMahon*, Assistant District Attorney, with him) for the Commonwealth.

Abbe Smith, for Criminal Justice Institute, amicus curiae, submitted a brief.

Melvin Spaeth, Darryl W. Jackson, Laura J. Hines, Ruth Ann M. Nicastri & Charles W. Scarborough, of the District of Columbia, *& Robert S. Mueller, III, & Peter A. Spaeth*, for The National Victim Center, amicus curiae, submitted a brief.

Wayne C. Paquette, amicus curiae, submitted a brief.

LIACOS, C.J. The defendant pleaded guilty to two indictments charging her with armed robbery and to so much of a murder indictment as charged manslaughter. The defendant now seeks to appeal from the portion of her sentence which places her on probation for twenty years with a special condition that she not profit from the sale of her story to the news media.[1] The defendant requests that we vacate the special

[1] The Commonwealth contests the defendant's right of appeal on the grounds that (1) she voluntarily consented to the now contested condition of probation and (2) that she failed to seek recourse from the trial judge under Mass. R. Crim. P. 29, 378 Mass. 899 (1979) (motion to revise or revoke) which the Commonwealth says, has not been acted on by the judge. We note, however, that the docket of the Superior Court reveals that such a motion was filed on December 1, 1993, together with an affidavit in support and was denied without hearing on December 17, 1993. Additionally, we take the view that the defendant's motion for reconsideration, also

condition on the grounds (1) that it violates her right to freedom of expression under the First Amendment to the United States Constitution[2] since it imposes an unconstitutional prior restraint on content-based speech, (2) that it unconstitutionally places the defendant in jeopardy for the actions of third persons, and (3) that it is unconstitutionally vague in violation of her due process rights. We granted the defendant's application for direct appellate review.

The facts giving rise to this appeal can be stated briefly. On September 23, 1970, five individuals, including the defendant, robbed the State Street Bank and Trust Company at the intersection of Western Avenue and Everett Street in the Brighton section of Boston. While three of her accomplices entered the bank, the defendant sat several blocks away in the "switch car," ready to drive the three from the scene once the robbery was completed. The fifth accomplice, William Gilday, sat in an automobile across the street from the bank as a lookout. Gilday was armed with a fully loaded Thompson submachine gun.

The silent alarms inside the bank were triggered several minutes after the robbers entered the bank and Boston Police Officers Walter Schroeder and Frank Callahan responded to

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denied, was, in substance, a motion under rule 30. *See Ahern* v. *Warner*, 16 Mass. App. Ct. 223, 225 (1983). See also *Stewart, petitioner*, 411 Mass. 566, 569 (1992). The matter having been fully briefed and being of public interest, we proceed to consider the merits. *Wellesley College* v. *Attorney Gen.*, 313 Mass. 722, 731 (1943). We limit our review to the appropriate record before us, namely, the transcripts of the plea and sentencing hearings and the contract of probation.

[2] The defendant asserts that art. 16 of the Declaration of Rights, as amended by art. 77 of the Amendments to the Massachusetts Constitution, provides greater protection than does the First Amendment. While we have held that to be true in certain circumstances, e.g., *Commonwealth* v. *Sees*, 374 Mass. 532 (1977), the claim of a violation of the Declaration of Rights was not raised before the trial judge; hence, it is not properly before us. See *Boston* v. *Back Bay Cultural Ass'n*, 418 Mass. 175, 178 n.6 (1994). Additionally, the applicability of art. 16 is not adequately briefed and hence is waived. Mass. R. A. P. 16 (a) (4), as amended, 367 Mass. 921 (1975). See *Commonwealth* v. *Cook*, 419 Mass. 192, 194 n.1 (1994). Thus, we consider the issues argued solely under the First Amendment.

the scene. The robbers had left the bank and headed for the "switch car" before the officers arrived, but Gilday maintained his position as lookout. When Officer Schroeder attempted to enter the front door of the bank he was shot in the back by Gilday. Officer Schroeder succumbed to his wounds and died the following day.

Three of the robbers were arrested shortly after the crimes, and the fourth was apprehended in 1975. The defendant, however, managed to evade law enforcement authorities and eventually settled in Oregon under an assumed name.

On September 15, 1993, in the glare of national news media attention, the defendant surrendered to Massachusetts authorities after twenty-three years as a fugitive from justice. Represented by counsel, the defendant pleaded guilty to two indictments charging armed robbery and to so much of a murder indictment charging manslaughter. The pleas were accepted after a full and complete colloquy by the judge with the defendant and her counsel. The prosecution recommended a sentence of from eight to twelve years. The judge accepted the recommendation with respect to the manslaughter charge and one of the armed robbery charges, ordering the defendant to serve the terms concurrently. He exceeded the recommendation, however, with respect to the second armed robbery charge and sentenced the defendant to twenty-years' probation, to begin immediately. The written probation contract includes the following special condition:

> "You, your assignees and your representatives acting on your authority are prohibited from directly or indirectly engaging in any profit or benefit generating activity relating to the publication of facts or circumstances pertaining to your involvement in the criminal acts for which you stand convicted (including contracting with any person, firm, corporation, partnership, association or other legal entity with respect to the commission and/or reenactment of your crimes, by way of a movie, book, magazine article, tape recording, phonograph rec-

> ord, radio or television presentations, live entertainment of any kind, or from the expression of your thoughts, feelings, opinions or emotions regarding such crime). This prohibition includes those events undertaken and experienced by you while avoiding apprehension from the authorities. Any action taken by you whether by way of execution of power of attorney, creation of corporate entities or like action to avoid compliance with this condition of probation will be considered a violation of probation conditions."

The judge gave the defendant the opportunity to withdraw her guilty pleas as the sentence exceeded the recommendation of the prosecution. She declined. After consulation with counsel, she agreed to the special condition in open court and, shortly thereafter, affixed her signature to the written contract of probation.

We begin with the recognition that judges are permitted great latitude in sentencing as long as the sentence imposed is within the limits provided by the statute under which the defendant is convicted. *Commonwealth* v. *Goodwin*, 414 Mass. 88, 92 (1993). *Commonwealth* v. *Burke*, 392 Mass. 688, 694 (1984). The defendant was placed on probation for her second conviction of armed robbery, an offense punishable by life imprisonment. G. L. c. 265, § 17 (1992 ed.). Thus, the sentence did not exceed the limits of the applicable statute. In addition, G. L. c. 276, § 87 (1992 ed.), which permits the imposition of probation, states that a trial court "may place on probation . . . any person before it charged with an offense or a crime for such time and *upon such conditions as it deems proper* . . . after a finding or verdict of guilty" (emphasis supplied). G. L. c. 276, § 87. The conditions of probation "may include, *but shall not be limited to*, participation by said person in specified rehabilitative programs or performance by said person of specified community service work" (emphasis supplied). G. L. c. 276, § 87A (1992 ed.).

It has been held generally that a condition of probation is enforceable, even if it affects a "preferred" right, where the condition is primarily designed to meet, i.e., "reasonably related" to, the goals of sentencing and of probation. See, e.g., *United States* v. *Clark*, 918 F.2d 843, 847-848 (9th Cir. 1990); *United States* v. *Tolla*, 781 F.2d 29, 32-34 (2d Cir. 1986), and cases cited; *United States* v. *Lowe*, 654 F.2d 562, 567 (9th Cir. 1981); *State* v. *Graham*, 33 Conn. App. 432, 446-448 (1994); *State* v. *McGill*, 114 N.C. App. 479, 483-484 (1994); *Commonwealth* v. *Koren*, 435 Pa. Super. 499, 506 (1994); *State* v. *Matheny*, 884 S.W.2d 480, 483 (Tenn. Crim. App. 1994); *State* v. *Mace*, 154 Vt. 430, 436 (1990); *State* v. *Miller*, 175 Wis. 2d 204, 208 (1993); *Leyba* v. *State*, 882 P.2d 863, 865 (Wyo. 1994). See also *Cepulonis* v. *Commonwealth*, 384 Mass. 495, 499 (1981).

In general, when imposing a sentence, the judge should consider several goals: punishment, deterrence, protection of the public, and rehabilitation. *Commonwealth* v. *Goodwin*, *supra* at 92. The primary goals of a probationary sentence are rehabilitation of the probationer and protection of the public. *Commonwealth* v. *LaFrance*, 402 Mass. 789, 795 (1988), quoting *State* v. *Griffin*, 131 Wis. 2d 41, 65 (1986) (Abramson, J., dissenting). *United States* v. *Tolla*, *supra* at 33. Other recognized goals of probation include punishment, deterrence, and retribution. *United States* v. *Tonry*, 605 F.2d 144, 148 (5th Cir. 1979) (condition of probation upheld as long as "reasonably related to rehabilitation of the probationer, protection of the public against other offenses during its term, deterrence of future misconduct by the probationer or general deterrence of others, condign punishment, or some combination of these objectives"). "A probation condition is not necessarily invalid simply because it affects a probationer's ability to exercise constitutionally protected rights." *Id.* at 150. Conditions of probation that affect First Amendment rights have been upheld. *Tonry*, *supra* at 151, and cases cited. See *Tolla*, *supra* at 33-34; *Clark*, *supra*. Courts recognize

the reasonableness of imposing probation as an alternative to other forms of punishment, e.g., incarceration, in appropriate cases. "Indeed, it is a rare sentence, whether or not jail is a part of it, that does not in fact involve all of these objectives — punishment, deterrence, protection of the public, rehabilitation and restitution." *United States* v. *Tolla*, *supra* at 35. With these general principles in mind, we address each of the defendant's arguments.

The defendant argues that the special condition quoted amounts to a prior restraint on content-based speech in violation of her First Amendment rights. We disagree.

We agree that, because the condition places a financial disincentive on the defendant based on the content of her speech, it does implicate her First Amendment rights. *Simon & Schuster, Inc.* v. *New York Crime Victims Bd.*, 502 U.S. 105, 115 (1991). However, the condition allows the defendant to speak on any subject, including her crimes, whenever, and through whatever medium she desires. Her arguments to the contrary are unpersuasive. The condition merely prohibits the defendant from profiting financially from speech about her crime or her experience as a fugitive. In *Simon & Schuster*, the Supreme Court held that a financial burden on content-based speech was unconstitutional when applied by a statute which, although it served a compelling State interest, was overly broad.[3] The holding of the *Simon & Schuster* case is

[3] *Simon & Schuster, Inc.* v. *New York Crime Victims Bd.*, 502 U.S. 105 (1991), involved a challenge to New York's "Son of Sam" law, which required that anyone contracting with a person accused or convicted of a crime with respect to his telling the story of his crime in the media, or their thoughts and feelings about their crime, submit a copy of the contract to the Crime Victims Board (board) and pay over to the board any monies which would otherwise be owed to the person accused or convicted or his representative. The statute broadly defined "person convicted of a crime" as including "any person convicted of a crime in this state either by entry of a plea of guilty or by conviction after trial *and any person who has voluntarily and intelligently admitted the commission of a crime for which such person is not prosecuted*" (emphasis added). *Id.* at 110. N.Y. Exec. Law § 632-a(10)(b) (McKinney 1982 & Supp. 1991). The Court noted that the statute was presumptively unconstitutional as it placed a financial burden

not applicable here. That case involved a statute of general applicability implicating content-based free speech rights and was thus subject to strict scrutiny requiring a compelling State interest and narrow tailoring to meet that interest. The New York statute in issue was struck down because it was overly broad, i.e., it applied not only to criminals convicted in a court of law but also to those accused of a crime and those who admitted to committing a crime.

The defendant in the case at bar is a convicted felon and the special condition is part of her probationary sentence. Generally, "probationer[s do not] have a right to be free from conditions that severely restrain [their] freedom of action." *United States* v. *Tonry*, *supra* at 148. As long as the condition meets the "reasonably related" test, it is not per se unconstitutional even if it restricts a probationer's fundamental rights.[4] *United States* v. *Bolinger*, 940 F.2d 478, 480 (9th Cir. 1991). *United States* v. *Peete*, 919 F.2d 1168, 1181 (6th Cir. 1990).

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on speakers because of the content of their speech. *Simon & Schuster, Inc.*, *supra* at 115. Thus, the court examined whether the statute served a compelling State interest and whether the statute was narrowly tailored to meet that interest so as to comport with the First Amendment, *Id.* at 118.

Although it concluded that preventing criminals from profiting from speaking about their crimes was a compelling State interest, the Court determined that the statute could not stand because it was not narrowly drawn so as to meet the interest without being overinclusive. *Id.* at 121. The statute's broad definition of "person convicted of a crime" enabled the board to escrow the income of any author who admitted to having committed a crime, whether or not the author was ever actually accused or convicted. *Id.* The Court noted that the statute's effect would be felt indefinitely and by many people. Thus, the statute was held unconstitutionally broad.

[4] This court has held that such restrictions are not without limits, *Commonwealth* v. *LaFrance*, 402 Mass. 789 (1988). In *LaFrance*, a special condition of the defendant's probation required that the defendant submit to searches of her person, her possessions, and any place where she may be, with or without a search warrant, on the request of a probation officer, for the term of her probation. We held that, under both the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights, a warrantless search of the probationer required at least a "reasonable suspicion that a search might produce evidence of wrongdoing." *Id.* at 790. Moreover, we held that there were some instances where art. 14 would require a search warrant to conduct such searches.

Cf. *Commonwealth* v. *LaFrance*, 402 Mass. 789 (1988) (holding unconstitutional condition of probation which allowed for warrantless searches).

A special condition of probation is not subject to the same rigorous First Amendment scrutiny that is employed against a statute of general applicability. The condition in the instant case applies only to the defendant and is reasonably related to a valid probation purpose. It serves what we believe, and what several other courts and commentators agree,[5] are valuable punitive and deterrent purposes beyond those that would be served through the imposition of a prison sentence alone. In these circumstances, such a condition is permissible.[6]

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[5] See, e.g., *Simon & Schuster, Inc.* v. *New York Crime Victims Bd.*, *supra* at 119 ("The State . . . has an undisputed compelling interest in ensuring that criminals do not profit from their crimes"); *United States* v. *Waxman*, 638 F.Supp. 1245, 1246 (E.D. Pa. 1986); Filcik, Signs of the Times: Scarlet Letter Probation Conditions, 37 Wash. U.J. Urb. & Contemp. L. 291 (1990); Note, The Modern Day Scarlet Letter: A Critical Analysis of Modern Probation Conditions, 1989 Duke L.J. 1357.

[6] Many other conditions placing burden on otherwise constitutionally protected First Amendment or other rights have been upheld when applied to probationers. See, e.g., *United States* v. *Romero*, 676 F.2d 406 (9th Cir. 1982) (probationer convicted of a drug offense prohibited from associating with others convicted of drug offenses); *Malone* v. *United States*, 502 F.2d 554 (9th Cir. 1974), cert. denied, 419 U.S. 1124 (1975) (probationer convicted of gun exportation for Irish Republican Army prohibited from, inter alia, visiting Irish pubs); *Whaley* v. *United States*, 324 F.2d 356 (9th Cir. 1963), cert. denied, 376 U.S. 911 (1967) (probationer convicted of impersonating agent of Federal Bureau of Investigation while repossessing vehicle prohibited from working as a repossessor); *United States* v. *Tonry*, 605 F.2d 144 (5th Cir. 1979) (defendant convicted of violating Federal Election Campaign Act, inter alia, prohibited from running for office or participating in political activity during probation); *Markley* v. *State*, 507 So. 2d 1043 (Ala. Crim. App. 1987) (probationer convicted of burglary and criminal mischief at abortion clinic required to stay 500 yards away from the clinic); *Goldschmitt* v. *State*, 490 So. 2d 123 (Fla. Dist. Ct. App. 1986) (probationer convicted of drunk driving required to place bumper sticker on automobile identifying his conviction); *State* v. *Morgan*, 389 So. 2d 364 (La. 1980) (probationer convicted of prostitution banned from French Quarter in New Orleans); *State* v. *Harrington*, 78 N.C. App. 39 (1985) (probationer convicted of drunk driving could not enter any premises licensed to sell alcoholic beverages); *State* v. *Sprague*, 52 Or. App. 1063 (1981) (probationer convicted of harassment required to maintain 10 p.m. curfew).

In our view, the condition imposed was reasonably related to a legitimate purpose of criminal sentencing. This defendant, and other defendants similarly situated, are deterred from seeking to profit directly or indirectly from criminality, the moral foundations of our society are reinforced by the condition, the defendant (and others like her) are given to understand that the crime committed and her successful, albeit illegal, fugitive status of over twenty-three years will bring neither reward, benefit, nor profit, and her rehabilitation and understanding of the depth of her criminality are enhanced.

A condition similar to the one at issue here was upheld in *United States* v. *Terrigno*, 838 F.2d 371 (9th Cir. 1988). In *Terrigno*, the defendant was convicted of embezzling and conversion of public funds from a federally funded counselling center of which she was the executive director. Part of Terrigno's sentence included probation, a condition of which was "[t]hat the defendant, during the period of probation, not receive any financial renumeration or any other thing of value from any speaking engagements, written publications, movies, or any other media coverage dealing with her involvement in this offense." *Id.* at 373. Terrigno claimed on appeal that the probation condition violated her First Amendment rights.

The Court of Appeals for the Ninth Circuit concluded that the condition did not restrict Terrigno's right to speak but merely prohibited her from receiving money for speaking about her crimes during the term of her probation. *Id.* at 374. "The trial court simply wanted to assure that Terrigno would not profit from her crime by exploiting her story in the media. The court's concern with this possibility is reasonable in that there had already been considerable media interest in the trial. . . ." *Id.* The court stated that the condition was reasonably related to Terrigno's rehabilitation because it reminds her "in a very practical sense that 'crime does not pay.'" *Id.* "We think there is likewise a reasonable nexus between the public welfare and preventing her from . . . profiting from telling her story. At the same time we see no

danger that the public will be denied the benefits of full exposure of the facts of her crime and conviction nor that Terrigno will be denied her [F]irst [A]mendment rights of expression because the trial court's condition only forbids Terrigno's making a profit, it does not restrict expression at all, and the restriction obtains only during her probation term."[7] *Id.* at 374-375.

The defendant's second argument concerns the portion of the special condition that extends the prohibition on profit to "[her] assignees and [her] representatives acting on [her] authority." She claims that this portion of the condition impermissibly puts her in jeopardy for the actions of third parties. She also claims that the condition burdens persons other than herself even though they were not convicted of any crime. Finally, she claims that this portion of the condition is overinclusive because it lacks clear boundaries and is discriminatory because it permits some third parties to profit

[7] A condition of probation similar to the defendant's was also employed in *United States* v. *Waxman*, 638 F.Supp. 1245 (E.D. Pa. 1986). In *Waxman*, the defendant pleaded guilty to receipt of stolen property and interstate transportation. The defendant was placed on probation with the condition that he not profit financially or participate in a project from which a friend or his family might profit, based on the sale of "any TV or radio scenario." *Id.* at 1246. The defendant sought a modification of the condition on the grounds that it deprived him of his First and Fifth Amendment rights and that the condition served purely punitive purposes. The court concluded that the condition did not violate the defendant's First or Fifth Amendment rights because it did not prohibit him from speaking but merely profiting from that speech. The court agreed that the defendant may have been deprived of a property interest, "but it was not without due process of law. Convicted felons frequently are deprived of property (and liberty) interests." *Id.*

The court also concluded that the condition was reasonably related to the goals of probation in that the condition was not meant to punish the defendant but served a rehabilitative, and deterrent, effect. "It is in his own interest for Dr. Waxman to learn that society will neither tolerate criminal behavior nor permit the criminal to profit from it when he can be prevented from doing so. Second, it is also in the interest of other members of society to learn by example that not only may they have to pay the piper but that they cannot expect the piper to pay them for their memoirs." *Id.*

from telling Power's story and not others. There is no merit to these claims.

Assuming, without deciding, that the defendant has standing to raise the claims of third parties, we think it is clear what conduct the condition prohibits regarding actions by third parties. The defendant's apparent confusion is merely a result of her strained reading of the condition and speculation as to its repercussions. See *State* v. *Miller*, 175 Wis. 2d 204, 212-213 (1993). One need look no further than the well-established definitions of "assignee" and "representative" to see that the condition restricts profit-generating activity only by those third persons acting on the defendant's behalf and on her authority (representatives) and by persons to whom she bestows the authority to pursue and enforce rights which would otherwise be hers alone (assignees).[8] The condition does not restrict any third party from telling the defendant's story, provided he or she is not acting on the defendant's authority as her representative or as her assignee.

Finally, the defendant argues that the condition is unconstitutionally vague.[9] She claims that it is unclear what behavior the condition prohibits and that the condition improperly leaves decisions to probation officers about when she can and cannot speak. We agree that the defendant is entitled to know what conduct is forbidden by her probation condition. The constitutional rule against vague laws applies as equally to probation conditions as it does to legislative enactments. *Griffin* v. *Wisconsin*, 483 U.S. 868, 875-876 n.3

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[8] Black's Law Dictionary 118 (6th ed. 1990), defines an "[a]ssignee" as "[a] person to whom an assignment is made; grantee," and defines "[a]ssignment" as "[t]he act of transferring to another all or part of one's property, interest, or rights." *Id.* at 119.

A "[r]epresentative" is "[a] person or thing that represents, or stands for, a number or class of persons or things, or that in some way corresponds to, stands for, replaces, or is equivalent to, another person or thing . . . [o]ne who represents others or another in a special capacity, as an agent, and term is interchangeable with 'agent.'" *Id.* at 1302.

[9] The defendant makes no argument that the condition violates due process in that it is disproportionate to the offense. *See Commonwealth* v. *Sanchez*, 405 Mass. 369, 379-380 (1989), and cases cited.

(1987). However, we believe the condition is adequately clear so as to inform the defendant of what conduct is prohibited. Of course, we are necessarily "[c]ondemned to the use of words [and thus] we can never expect mathematical certainty from our language." *Grayned* v. *Rockford*, 408 U.S. 104, 110 (1972). In light of this fact, we are of opinion that the probation condition is as clear as possible. We have stated, in discussing vagueness in regard to statutes, that "if the language which is challenged conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices, it is constitutionally adequate." *Commonwealth* v. *Adams*, 389 Mass. 265, 270 (1983), quoting *Commonwealth* v. *Jarrett*, 359 Mass. 491, 496-497 (1971). That much can be said in the instant case.

The special condition of the defendant's probation is affirmed.

So ordered.

COMMONWEALTH OF MASSACHUSETTS

THE TRIAL COURT

Department: Superior Trial Court October 6, 1993
Division: Suffolk Probation

To: POWER, KATHERINE

You have been placed on probation to 20 yrs.

You have been placed on probation to prob. 20 yrs. to commence this date with a suspended sentence of _____.

Unless otherwise excused, you are required to return to court on AS DIRECTED when a report on your probation progress will be made.

If you fail to comply with any of the following conditions of probation, now placed on you by this court, you may be ordered to appear again in court, after due notice, and the court may change the conditions, extend the period of probation or impose sentence. If you should fail to appear you may be defaulted and a warrant for your arrest may be issued.

CONDITIONS OF PROBATION

(Strike out conditions not imposed by the Court)

1. You must obey local, state or federal laws or court order.
2. You must report to your assigned probation officer at such time and place as he/she requires.
3. You must notify the probation officer immediately of a change of residence or employment.
4. You must not leave the Commonwealth without the express permission of the probation officer. Such permission may be conditioned upon your agreement to waive extradition.

SPECIAL CONDITIONS OF PROBATION

5. SEE ATTACHED CONDITIONS OF PROBATION.

6. _____

_____

7. _____

_____

I have read and understand the above conditions of probation and agree to observe them. I acknowledge receipt of a copy of these conditions.

SUPERVISING PROBATION OFFICER WILL BE:	KATHERINE A. POWER
DAVID R. SULLIVAN 725-8241	Probationer
DAVID R. SULLIVAN	_____
Witness (Probation Officer)	Make checks payable to
____ Signed original to Probationer.	_____
X Signed duplicate in folder.	

SPECIAL CONDITIONS OF PROBATION

You, your assignees and your representatives acting on your authority are prohibited from directly or indirectly engaging in any profit or benefit generating activity relating to the publication of facts or circumstances pertaining to your involvement in the criminal acts for which you stand convicted (including contracting with any person, firm, corporation, partnership, association or other legal entity with respect to the commission and/or reenactment of your crimes, by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentations, live entertainment of any kind, or from the expression of your thoughts, feelings, opinions or emotions regarding such crime). This prohibition includes those events undertaken and experienced by you while avoiding apprehension from the authorities. Any action taken by you whether by way of execution of power of attorney, creation of corporate entities or like action to avoid compliance with this condition of probation will be considered a violation of probation conditions.

SUPERVISING PROBATION OFFICER WILL BE:

DAVID R. SULLIVAN
725-8241

KATHERINE A. POWER
Probationer

DAVID R. SULLIVAN
Witness (Probation Officer)

____ Signed original to Probationer.

X Signed duplicate in folder.

October 29, 1993 Motion for Reconsideration of Special Condition of Probation and Hearing is denied: Counsel is referred to Suffolk Superior Probation Office to be reminded of strict compliance to probation conditions imposed on 10/6/93. Court observes acknowledgement of defendant's understanding of those conditions to probation office following this imposition as well as their publications to her and counsel prior to imposition of sentencing.

/s/ Banks J.
attest Paul D. Nash, Asst. Clerk

Supreme Court, U.S.
FILED
NOV 30 1995
CLERK

(2)

No. 95-277

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

KATHERINE ANN POWER, *Petitioner*,

v.

COMMONWEALTH OF MASSACHUSETTS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE MASSACHUSETTS SUPREME JUDICIAL COURT

RESPONDENT'S BRIEF IN OPPOSITION

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21 pp

QUESTION PRESENTED

Whether this Court should grant certiorari to review the constitutionality of a condition of probation which forbade petitioner from profiting from her crimes, where the condition was imposed with the petitioner's consent, where she declined the opportunity of withdrawing her guilty plea if she did not agree to the condition, and where, consistent with the approach taken by other courts, the lower court found the condition reasonably related to the purposes of criminal sentencing and probation.

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No. 95-277

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

KATHERINE ANN POWER,
Petitioner

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE MASSACHUSETTS SUPREME JUDICIAL COURT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent Commonwealth of Massachusetts respectfully requests that this Court deny the petition for writ of certiorari.

OPINIONS BELOW

The opinion of the Supreme Judicial Court of Massachusetts is reported at 420 Mass. 410, 650 N.E.2d 87 (1995).

STATEMENT OF THE CASE

During the summer of 1970, five individuals formed a group which planned to commit various criminal acts throughout the United States. (Tr. 9/15/93 20). On September 23, 1970, petitioner Katherine Ann Power, along with four others, robbed the State Street Bank and Trust Company in the Brighton section of Boston. Three of her cohorts entered the bank, armed, and robbed the tellers of over $26,000. A fourth participant, William Gilday, armed with a fully loaded Thompson submachine gun, positioned himself in a car across the street from the bank. Power sat in a "switch car" several blocks away ready to drive the others from the scene after the robbery was completed.

Boston police officers Walter Schroeder and Frank Callahan responded to the bank's silent alarms which had been triggered when the robbers entered. The robbers had left the bank by the time the officers arrived and were heading for the "switch car"; Gilday remained on the scene as a lookout. When Officer Schroeder approached the front door of the bank, he was shot in the back by Gilday and died of his wounds the following day. Commonwealth v. Power, 420 Mass. 410, 650 N.E.2d 87, 88 (1995).

Three of the robbers were arrested within days of the crimes; a fourth eluded authorities until 1975 when she was apprehended in Pennsylvania. Power remained a fugitive for twenty-three years. On September 15, 1993, "in the glare of national news media attention," Power surrendered to state and federal authorities. Id. at 412, 650 N.E.2d at 88.[1]

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[1] At the sentencing hearing, the Court and the parties referred to Power's lengthy fugitive status and extensive negotiations between government authorities and Power

On September 15, 1993, represented by counsel, petitioner offered to plead guilty to two indictments charging armed robbery and to so much of a murder indictment as charged manslaughter. After a full and complete colloquy, the Court accepted the pleas, and scheduled a sentencing hearing for October 6, 1993.

Pursuant to its agreement with petitioner, at the sentencing hearing on October 6, 1993, the government recommended she be sentenced to a state prison term of eight to twelve years; petitioner's attorney requested a shorter sentence. The judge reiterated what he had said during the plea proceeding: under Massachusetts law the judge is not bound to sentence in accordance with any agreement of the parties, but if the Court chooses to exceed the government's recommendation, the defendant may withdraw her guilty plea and proceed to trial.

The Court accepted the Commonwealth's recommended prison term for manslaughter and one of the two armed robbery counts. The judge, however, expressly indicated he intended to exceed the recommendation by imposing on one armed robbery count a twenty-year probationary sentence, with the special condition that Power not profit or benefit from her crimes. Under oath, and after consultation with counsel, Power accepted the condition of probation and specifically declined to withdraw her plea of guilty. She was then sentenced as the Court indicated it would do. The probation contract, which Power signed that day, outlines in more detail the terms of the special condition. Commonwealth v. Power, 420 Mass. at 413, 650 N.E.2d at 89. On appeal the Supreme Judicial Court

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preceding her surrender and plea. In addition to the state charges, she also faced federal charges.

affirmed the special condition, finding that while it implicated Power's First Amendment rights, it was reasonably related to a valid probation purpose. Commonwealth v. Power, 420 Mass. at 415, 421, 650 N.E.2d at 90, 93.[2]

Reasons For Denying The Writ

I. POWER AGREED TO ACCEPT THE SPECIAL CONDITION OF PROBATION AND DECLINED TO WITHDRAW HER GUILTY PLEA WHEN INFORMED THE COURT WOULD IMPOSE IT.

In Massachusetts, conditions of probation must be agreed to by the defendant. Massachusetts General Laws c. 276, § 87 provides the court the power to place a convicted

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[2] The procedural posture of Power's challenge to the special condition is somewhat unclear. In her brief to the Supreme Judicial Court, Power outlined her objection as having been raised in letters by counsel to the sentencing judge, and in a Motion for Reconsideration of Special Conditions of probation, claiming they were vague and in violation of the First Amendment. The Commonwealth argued below that Power failed to follow the proper procedures to challenge the condition. The Supreme Judicial Court referenced a Revise and Revoke motion not mentioned by the defendant, found the reconsideration motion akin to a Mass. R. Crim. P. 30 motion, and proceeded to consider the merits, "[t]he matter having been fully briefed and being of public interest." Commonwealth v. Power, 420 Mass. at 411 n.1, 650 N.E.2d at 88 n.1.

defendant, with his or her consent, on probation for such term and upon such conditions as the judge deems proper. Whether on a guilty plea or after trial, probationary conditions require the assent of the defendant. Commonwealth v. Cotter, 415 Mass. 183, 188, 612 N.E.2d 1145 (1993). The consent requirement distinguishes probation in Massachusetts from that in other jurisdictions or from a probationary sentence that is imposed by the court without a defendant's assent. There is no question that in this case the Court followed the proper procedures to verify Power's consent to the condition that she not profit from her crimes. Nor is there a suggestion that her consent, given in open court, under oath, was not voluntary or that the plea and sentencing proceedings were flawed.

Another important aspect of the petitioner's probationary condition is that it came as part of her guilty plea. She was specifically given the option, consistent with Massachusetts law, to withdraw her plea and go to trial should she not be willing to abide by the condition. It was not, as is often the case with challenged conditions of probation, imposed upon her against her will, nor was she required to accept the condition on pain of incarceration on that charge. Compare Commonwealth v. LaFrance, 402 Mass. 789, 791 n.3, 525 N.E.2d 379, 381 n.3 (1988).

Where "the voluntariness of a criminal defendant's concession to imposition of a particular sentence is questionable, the relevant inquiry is whether the sentencing stipulation was informed and uncoerced on the part of the defendant . . . ." Libretti v. United States, ___ U.S. ___, 1995 WL 648120 (Nov. 7, 1995). That a defendant makes the choice in connection with a plea simply does not render the election an impermissible abrogation of the defendant's rights. See McMann v. Richardson, 397 U.S. 759, 766-767, 770 (1970). A condition of probation which would

otherwise be unconstitutional, that results from a negotiated plea agreement, is not unconstitutional. See, e.g., United States v. Janko, 865 F.2d 1246, 1247 (11th Cir. 1989).

II. THE SUPREME JUDICIAL COURT'S DECISION UPHOLDING THE PROBATION CONDITION IS CONSISTENT WITH THE RULINGS OF THIS COURT AND THOSE OF OTHER JURISDICTIONS.

Fashioning appropriate probationary terms suitable to the offender and the offense requires the sentencing court be afforded considerable discretion. In fact, the "success of probation as a correctional tool is in large part tied to the flexibility within which it is permitted to operate." ABA Standards Relating to Probation § 3.3 commentary (Approved Draft 1970). This includes the imposition of restrictions that encroach to some degree on the probationer's personal liberties. All criminal sentencing involves to a greater or lesser degree, some restriction on the convicted defendant's behavior.

Petitioner agrees with the notion that probationers may be subject to restrictions that would be unconstitutional if applied to the general public. Petition at 5. She suggests, however, that there is some disagreement as to the proper inquiry for evaluation of the propriety of probationary conditions which implicate First Amendment rights. A review of the cases upon which she relies reveals that the distinction she posits is illusory. Moreover, petitioner cites no disagreement among lower courts as to the validity of any probationary condition similar to the one she challenges in this case.

The two other jurisdictions which have addressed the validity of a probation condition forbidding financial profit

similar to that imposed here upheld the conditions as reasonably related to the purposes of probation. In United States v. Terrigno, 838 F.2d 371 (9th Cir. 1987), the defendant was enjoined, as a condition of probation, from receiving money for speaking about her crimes, embezzlement and converting public funds. The condition stated that during her probationary period the defendant could "not receive any financial remuneration or any other thing of value from any speaking engagements, written publications, movies, or any other media coverage dealing with her involvement in this offense." Id. at 373. The Ninth Circuit found the condition reasonably related to the rehabilitation goal of probation: "We certainly cannot say it is unreasonable to think that the rehabilitation of a person . . . will be more effective if she is reminded in a very practical sense that 'crime does not pay.'" Id. at 374. The rehabilitative goal of preventing the defendant from profiting from her crime would neither deny the public the benefit of hearing her story nor unduly restrict her First Amendment rights. Id.

Similarly, in United States v. Waxman, 638 F. Supp. 1245 (E.D. Pa. 1986), the defendant who pleaded guilty to charges of art theft was restricted from any sort of financial profit from his well-publicized crimes. Rejecting a First Amendment challenge, the court found the probationary condition reasonably related to rehabilitation: "Certainly, it is in his own interest . . . to learn that society will neither tolerate criminal behavior nor permit the criminal to profit from it when he can be prevented from doing so." Id. at 1246.

The Supreme Judicial Court, in a thoughtful opinion, reviewed the cases from other jurisdictions addressing the basic questions implicated in this case and concluded, correctly, that probation conditions are enforceable even if

they affect a preferred right so long as the condition is primarily designed to meet the goals of sentencing and of probation. Commonwealth v. Power, 415 Mass. at 90, 650 N.E.2d at 89. Stating that merely because constitutional rights may be implicated the condition is not invalidated, the Court also recognized that restrictions are not without limitation where they bear no rational relationship to a valid sentencing goal or are simply overly offensive. Id.

United States v. Smith, 972 F.2d 960, 961-962 (8th Cir. 1992), which petitioner cites as standing for an analysis different than that undertaken by the Supreme Judicial Court, to be applied to a probationary condition affecting a fundamental right, Petition at 5, does no more than rely on the same cases which guided the Supreme Judicial Court's decision. In Smith, a probationer convicted of a narcotics offense was enjoined from causing the conception of a child with one other than his wife. The court sought to determine whether condition was proper under the factors in the Federal Probation Act, 18 U.S.C. § 3651 et seq., and found it unworkable and unrelated to the seriousness of the drug offense and to promoting respect for the law.

Every court that has considered probationary conditions has undertaken the same analysis, looking to see whether the conditions are reasonably related to the statutory purposes of probation and whether they are reasonably necessary to attain those purposes. The Supreme Judicial Court did not undertake a different analysis, and in fact quoted and relied upon the authorities petitioner now suggests state a different standard. E.g., United States v. Peete, 919 F.2d 1168 (6th Cir. 1990); United States v. Lowe, 654 F.2d 562 (9th Cir 1981); United States v. Tonry, 605 F.2d 144 (5th Cir. 1979). In fact, United States v. Terrigno, 838 F.2d at 374, which petitioner claims takes a "minority" approach, Petition at 6, indicates that "careful

review" is necessary when a probation condition restricts fundamental rights. This conclusion was relied upon in United States v. Peete, 919 F.2d at 1181, a case petitioner says undertakes a stricter analysis.

No authority cited by petitioner suggests that a probationary condition is subject to the same First Amendment scrutiny that applies to statutes or restrictions of general applicability. The so-called special scrutiny that is employed when reviewing probation conditions is no more than an inquiry whether the condition is drawn to achieve the purposes of probation.

For probation imposed in the federal courts, the test is limited to the stated purposes of 18 U.S.C. § 3651, and conditions must be reasonably related to and crafted to meet the statute's goals of rehabilitation of the offender and protection of the public. To the degree other jurisdictions require "careful analysis" to assure the condition is reasonably related when a fundamental right is implicated, the Supreme Judicial Court concurred and conducted that inquiry. "Careful review" does not imply a different standard of review.

Once it is determined that all courts that have reviewed probationary conditions under this test do so in essentially the same manner, this case stands for no more than the routine question whether the test was properly applied to the particular facts of this defendant and her circumstances and is a constitutionally unremarkable matter. In assessing the condition imposed by the Massachusetts court, the inquiry must be whether the condition serves the state's purposes in criminal sentencing. See Griffin v. Wisconsin, 483 U.S. 868, 875 (1987) (in determining whether state's needs justify regulation applicable to probationers, Court must take regulation as interpreted by state courts). Massachusetts had declared the purposes of a

criminal sentence -- including probation -- go beyond those underlying the federal statute to include punishment, retribution and deterrence in addition to rehabilitation and public protection. Commonwealth v. Power, 420 Mass. at 414-415, 650 N.E.2d at 90. Thus any review of Power's probationary condition must be measured against those purposes, and not be strictly limited to the goals of the federal probation statute.[3]

Under this litmus, the probation condition imposed on Power furthers Massachusetts's sentencing goals. Allowing her to profit from her crime and her ability to evade apprehension would not serve to rehabilitate her. Rather, it would provide an undeserved reward for her behavior. The rehabilitation needs for one who, while pleading guilty, had remained a fugitive for years and surrendered only after lengthy negotiations, are acute. The condition also serves as a deterrent both to her and to the general public. As the Supreme Judicial Court held, by this condition this defendant and others similarly situated are "given to understand that the crime committed and her successful, albeit illegal, fugitive status of over twenty-three years will bring neither reward, benefit, or profit, and her rehabilitation and understanding of the depth of her criminality are enhanced." Commonwealth v. Power, 420 Mass. at 418, 650 N.E.2d at 91-92. The state may validly deter any expectation that

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[3] The practice of placing defendants on probation began in Massachusetts as part of the common law independent of statutory authorization. Buckley v. Quincy Division of the District Court, 395 Mass. 815, 817 n.2, 482 N.E.2d 511, 512 n.2 (1985).

those who commit notorious or sensational crimes[4] may reap large profits from their stories of those crimes. Moreover, every modern notion concerning the purposes of sentencing recognizes the retributive nature of sentencing. All sentences, including non-incarcerative sentences of probation, carry a measure of punishment and restriction on liberties enjoyed by those not convicted of criminal behavior. See United States v. Tolla, 781 F.2d 29, 35 (2d Cir. 1986); United States v. Tonry, 605 F.2d at 148. Any person who commits crimes against society, especially crimes of violence, can properly expect to be constrained in ways that may be characterized as punishment. It is no less true for sentences of probation than it is for prison sentences.[5]

The test employed to determine the validity of a probationary condition that implicates a First Amendment right is not altered by this Court's decision in Simon & Schuster, Inc. v. New York State Crime Victims Board, 502 U.S. 105 (1991). In Simon & Schuster this Court struck down New York's "Son of Sam" law providing that profits from speech related to any crime be placed in an escrow

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[4] The amicus National Victim Center pointed out below that Power was on the FBI's "Most Wanted" list for 14 years, making her one of the longest sought after women fugitives in FBI history. Christopher B. Daly, Woman Ends 23 Years as a Fugitive: Ex-Protester Pleads Guilty in Bank Heist, Wash. Post Sept. 16, 1993, at A1.

[5] It is not unusual for a probationary condition to run concurrent with a prison sentence if the purposes of the condition, be they to effectuate restitution, a stay away order, or prohibit profiting from crime, dictate that they be in place simultaneously with incarceration.

account for the benefit of crime victims, because the statute was overbroad as it reached to all persons engaged in expressive conduct in which they admitted some criminal conduct, regardless of whether they had been convicted. This Court also found the statute not narrowly tailored to meet its dual stated purposes of ensuring criminals do not profit from their crimes and in compensating victims of crime. The Court found no compelling interest in a statutory scheme which sought to compensate victims only from the criminal's "story telling" proceeds rather than his other assets. Id. at 119-120.

Power recognizes that her probation condition does not suffer from overbreadth. Petition at 7. This distinction is of critical importance. Unlike a statute with general applicability, the condition here is directed against one individual who has been convicted of serious offenses and is framed in terms of her particular circumstances. The condition does not irrationally attempt to compensate victims with profits of one type of speech. Rather, it is directly responsive to what this Court declared to be an "undisputed" compelling interest: "that criminals do not profit from their crimes." Id. at 119. Even where preventing a criminal from profiting from crime in some way burdens constitutionally protected rights, this Court has affirmed the government's "legitimate interest in depriving criminals of economic power." Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 631 (1989) (no right to use forfeitable assets to retain attorney or to exercise right to speak.)

Just as this Court has rejected strict scrutiny review of prison regulations affecting constitutional rights in favor of a reasonable relationship standard, Turner v. Safly, 482 U.S. 78 (1987), the demands of the criminal justice system and the purposes of sentencing process dictate the same result for review of probation conditions. The lower

standard of review is warranted because probationers, like prisoners, "do not enjoy 'the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special conditions'." Griffin v. Wisconsin, 483 U.S. at 874, quoting Morrissey v. Brewer, 408 U.S. 471, 480 (1972). Even were the Court to conclude that conditions of probation which restrict a probationer's ability to profit financially from the story of his or her crime are subject to a strict scrutiny analysis, the condition here would survive as it furthers not only the general purposes of probation, but also because it rests upon a compelling state interest and is specifically tailored to achieve that end.

Contrary to Power's assertion, the Supreme Judicial Court did not effectively rule "that state courts have the discretionary authority to impose content-based restrictions on any speech, so long as the speaker has been convicted of a crime." Petition at 4. It held that the condition allows Power "to speak on any subject, including her crimes, whenever, and through whatever medium she desires. . . . The condition merely prohibits the defendant from profiting financially from speech about her crime or her experience as a fugitive."[6] Commonwealth v. Power, 420 Mass. at 415,

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[6] The Supreme Judicial Court allowed the record to be expanded to include information that Power appeared in a nationally televised interview with Barbara Walters on February 11, 1994, which was watched by millions of viewers. Prior to the decision of the Supreme Judicial Court, the New Yorker magazine and Boston Globe newspaper also published articles based on interviews with Power. See also Amicus Brief filed in the Supreme Judicial Court by the National Victim Center, which provided the Court with a copy of the Walters interview. The probation

650 N.E.2d at 90. This limitation on profit, while permitting unrestricted speech and expression, provides an appropriate limitation of the restriction that is necessary to achieve the compelling state interest.[7]

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department took no action against Power as the result of these interviews.

The expanded record also reveals that Power stated to her probation officer and to both the state court and the federal District Court under the pains of perjury that she has never had any intention of personally profiting financially from her "story."

[7] Reflective of the attention she received when she surrendered, and concerns expressed at the sentencing hearing that Power might well be characterized favorably not only for her actions but for her experience as a long-time fugitive, the court included within the probation order a restriction on those events undertaken and experienced by her while avoiding apprehension. This, too, was narrowly restricted to the demands of the particular case. (Tr. 10/6/93 8, 25-26, 30, 52.)

The suggestion that Power must have all speech pre-approved by her probation officer, or that the condition is impermissibly standardless and vague, is also belied by the specific terms and the narrow reach of the condition to prohibit only financial profit.

Conclusion

For all the above reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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